No. 86-1071

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF ALASKA,
Petitioner,

v.

RICHARD E. LYNG, Secretary of Agriculture,
R. MAX PETERSON, Chief, United States Forest Service, and
MICHAEL A. BARTON, Alaska Regional Forester, and
Their Respective Successors in Office,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Section 6(a) of the Alaska Statehood Act grants Alaska 800,000 acres "[f]or the purposes of furthering the development of and expansion of communities." The State of Alaska is entitled to select 400,000 of these acres from national forest land, "all of which shall be adjacent to established communities or suitable for prospective community centers and recreational areas." The lands "shall be selected by the State of Alaska with the approval of the Secretary of Agriculture. . . ."

The questions presented under Section 6(a) of the Act are:

1. Whether the State of Alaska must demonstrate not only, as the Act requires, that its land selections are "adjacent to established communities or suitable for prospective community centers and recreational areas," but also, as the Secretary of Agriculture (through the Forest Service) contends, that:

   a. there is a "reasonable expectancy," to the satisfaction of the Forest Service, that the land selections will in fact be used for the development of communities or community recreational areas; and

   b. land selected for community recreational sites be within 25 nautical miles of an existing or planned community.

2. Whether Congress, in providing that lands be selected "with the approval of the Secretary of Agriculture," granted the Secretary the authority to require Alaska to submit land use plans, subject to the review of the Secretary, in addition to the requisite showing under the Act.

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The State of Alaska, by and through the Office of the Attorney General, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 797 F.2d 1479 (Appendix A, App. A-1). The Memorandum and Order of the United States District Court for the District of Alaska (Von der Heydt, D.J.) is unpublished (Appendix B, App. B-1).

JURISDICTION

The Ninth Circuit on August 20, 1986, entered a judgment and an opinion reversing and remanding the District Court's Memorandum and Order which reversed the Secretary of Agriculture's administrative rejections of Alaska's land selections under the Alaska Statehood Act. App. A-21. No petition for rehearing was sought. On October 29, 1986 Justice Sandra D. O'Connor granted a Motion to Extend Time to File Petition for Writ of Certiorari to December 23, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339, 48 U.S.C. prec. 21 (1958) is reproduced in relevant part at page 3.

STATEMENT OF THE CASE

When Alaska became a state in 1959[1] more than 99% of all land in Alaska was owned by the federal government.[2] The Statehood Act made several land grants to Alaska "to alter the present distorted land ownership pattern"[3] in order to "encourage the internal improvements necessary to her future growth and development."[4] One of those grants entitled Alaska to select 400,000 acres of national forest lands "[f]or

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[1] Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339, 48 U.S.C. prec. 21 (1958).

[2] H. R. Rep. No. 624 *reprinted in* 1958 U.S. Code Cong. & Ad. News 2933.

[3] *Id.*

[4] 1958 Cong. Rec. Senate p. 12012 (statement of Sen. Jackson, floor leader of the bill).

the purposes of furthering the development of and expansion of communities." Section 6(a), Alaska Statehood Act.[5]

The national forest land grant was necessary because 99.9% of Alaska's southern regions, known as the southeast panhandle and the Prince William Sound area of southcentral Alaska, had previously been designated as the 20 million acre Tongass and Chugach National Forests. (A map of these regions of Alaska showing the locations of the national forests is found at Appendix C, App. C-1.) These areas comprise some of the most scenic and hospitable areas in Alaska for purposes

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[5] Section 6(a) provides:

> For the purposes of furthering the development of and expansion of communities, the State of Alaska is hereby granted and shall be entitled to select, within thirty-five years after the date of admission of the State of Alaska into the Union, from lands within national forests in Alaska which are vacant and unappropriated at the time of their selection not to exceed four hundred thousand acres of land, and from the other public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection not to exceed another four hundred thousand acres of land, all of which shall be adjacent to established communities or suitable for prospective community centers and recreational areas. Such lands shall be selected by the State of Alaska with the approval of the Secretary of Agriculture as to national forest lands and with the approval of the Secretary of the Interior as to other public lands: Provided, That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any such owner, claimant, locator, or entryman to the full use and enjoyment of the land so occupied: Provided further, That for the purposes of this section the term "public lands of the United States in Alaska which are vacant, unappropriated, and unreserved" shall include, without limiting the use thereof, the retained or reserved interest of the United States in lands which have been disposed of with a reservation to the United States of all minerals or any specified mineral or minerals.

Alaska Statehood Act, Pub.L. No. 85-508, 72 Stat. 339, 48 U.S.C. prec. 21 (1958) as amended by the Alaska National Interest Lands Act, Pub.L. No. 96-487, 94 Stat. 2371 (1980).

of community development and tourism, and also contain the center of the state government, Juneau. Because virtually no other land is available in these areas, Congress authorized Alaska to select, within 25 years, 400,000 acres from national forest lands "adjacent to established communities or suitable for prospective community centers and recreational areas." Id.[6] Although this land grant comprises only 1.7% of the Tongass and Chugach National Forests, it represents the only means by which Alaska can obtain title to land in the southeast panhandle and Prince William Sound area to plan for the future. The lands obtained through Section 6(a) grant, therefore, are Alaska's only legacy in some of the state's most desirable areas to sustain and promote community and recreational development and expansion through posterity.

In 1976, Alaska launched its first comprehensive program to fulfill its national forest grant entitlement. Extensive public hearings were held to identify the needs and aspirations of local communities, native corporations, municipalities, boroughs, and the state as a whole. Professional planners then evaluated those aspirations in light of current or planned transportation systems, existing land uses, patterns of private and public land ownership, resource development activities, location with respect to established communities, and the ability of state government to provide services. C.R. 21, 26.[7]

This scrutiny resulted in the delineation of clear selection objectives to accomplish the congressionally stated goal of "encourag[ing] the development and expansion of communities and recreation areas,"[8] as well as an identification of the types of lands suitable to fulfill the objectives. Alaska's selection

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[6] The 25 year period was extended to 35 years in the Alaska National Interest Lands Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980).

[7] The record in this case was generated predominately at the administrative hearing level and is referred to as "C.R." Where applicable, reference to the Ninth Circuit Excerpts of Record will also be cited as "Appellants' E.R." or "Appellee's E.R."

[8] S. Rep. No. 1163, 85th Cong., 1st Sess. 16 (1957).

objectives were to encourage community development and community recreation by selecting lands which permit the creation of new communities, expand existing communities, serve local recreational use patterns of the majority of the communities in southeast Alaska and Prince William Sound through a marine park highway system, promote tourism, and promote aquaculture development through the development of fish hatchery sites. Selected lands had to have the physical characteristics which would support the development arising from the areas' increased use. Accordingly, lands were carefully chosen for the following characteristics: an anchorage or easy access, a water supply, a location on a transportation corridor, a reasonably flat area to provide safe harbor and services to waterborne travellers, and the proper soils to safely handle waste disposal. C.R. 21.

The Secretary of Agriculture, through the Forest Service, concurred that "most of the tracts . . . are 'suitable' for the purposes for which they were selected." C.R. 21. Nonetheless, it subsequently disapproved approximately 51,000 acres of selections, primarily those for the marine park highway and fish hatchery sites. The Forest Service did not specify the grounds for disapproval of any specific site but, in a series of letters, stated generally that Alaska's selections did not comply with the Statehood Act because:

> there is no expressed intention of establishing new communities at or near any of the locations . . . [and] there is no expressed objective that the land selected will in fact be used for furthering the community development of existing communities.

C.R. 21. Appellee's E.R. 12. Furthermore, the Forest Service wrote that:

> [i]n those areas proposed for recreation there is no record of any existing community governments or planning boards proposing any of these sites for their community plans or programs. In reviewing the selections for prospective recreation areas, we considered the distance to the nearest community and the nature of the water over

> which recreationists from the community would have to travel. . . . Those areas [disapproved] are generally in excess of 25 miles water distance, ...

Id. In short, these land selections were rejected because, according to the Forest Service, Alaska had not demonstrated a "reasonable expectancy" of land use in accordance with the Act's purpose.

The Forest Service has never promulgated regulations governing Alaska's selections. It has instead issued four sets of guidelines over the years, all without public notice or participation. The first three guidelines listed detailed land uses the Forest Service considered acceptable for Section 6(a) selections, such as municipal playgrounds. In addition, the third set of guidelines, which was in effect at the time of Alaska's 1977 selections, required Alaska to prove "in the judgment of the Regional Forester" that the lands selected were "reasonably needed" for certain listed urban uses or were "needed for new townsites"[9]

After Alaska's selections were disapproved in early 1979, and after administrative appeals were filed, the Forest Service revised its guidelines to the current version:

> In order to be selected under the act, the selected tract must be either suitable for prospective community centers and recreation areas or must be adjacent to an established community.
>
> (1) *Suitable.* In order to qualify as suitable for a prospective community center and recreation area, a site must be physically able to support development of a community center and recreation area. In addition, there must be a reasonable expectancy that the site will be developed for those purposes. The phrase "prospective community center and recreation area" is to be read as a single standard and not as two separate or independent bases for land selections.

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[9] These guidelines from the Forest Service Manual are set out in part as Appendix D, App. D-1.

Forest Service Manual 5454.22 (4)(a).[10] It is unclear which set of guidelines was used to evaluate Alaska's selections because language from both versions appears in the disapproval letters.

Following administrative appeals, the Secretary of Agriculture declined review of the decision of the Chief of the Forest Service, and in 1979 Alaska filed suit in the district court. The district court granted Alaska's motion for summary judgment and reversed the Forest Service's disapprovals of Alaska's land selections because, inter alia,:

> [t]his 'reasonable expectancy' requirement is contrary to law. In applying this test to the State's land selections, the Forest Service is exceeding its authority under [Section] 6(a) . . . The plain language of the statute . . . [requires that land] selected for prospective community centers and for recreation areas must be suitable for that purpose. Any additional requirements are contrary to the plain meaning of the statute.

App. B-28. The Ninth Circuit reversed (Schroeder, J., partially dissenting), concluding that it was "not unreasonable" to interpret the phrase "suitable for prospective community centers and recreational areas" to require Alaska to prove a "reasonable expectancy" of use. App. A-20. However, Circuit Judge Schroeder dissented with regard to the "reasonable expectancy" requirement, stating that:

> [i]n insisting that the communities already be planned or in existence, the Service ignores the language of the statute which requires only that the land be 'suitable for prospective' community development.

App. A-23.[11]

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[10] The full text of the current guidelines regarding Section 6(a) selections is set out as Appendix E, App. E-1.

[11] The decisions below also addressed at length the issue whether prospective recreational sites must have a community nexus. The Petitioner is not seeking review of that issue by this Court.

REASONS FOR GRANTING THE WRIT

This case presents issues of vital importance to Alaska, for the Court of Appeals has seriously misread the Alaska Statehood Act in a manner that will forever stunt community growth and development in Alaska's southern region, where more than 99.9% of the area is national forest land and virtually no other land is available.

Alaska recognizes that, consistent with the plain meaning of Section 6(a) of the Act, its land selections must be "suitable for prospective community centers and recreational areas." But the additional requirement of the Forest Service — that there be a "reasonable expectancy" that the land will in fact be used as a community center or recreational area — runs counter to the unambiguous language of the Act.

"'Suitable" means fit for a purpose and "prospective" means relating to the future. Thus, according to the plain meaning of the statute, the statute's only requirement is physical suitability for future use — the site must be capable of supporting development cf a community or community recreational area or have the physical characteristics that make it fit for such use in the future. This reading of the statute creates workable, objective, and real selection criteria. Alaska must demonstrate that its land selections have the requisite physical characteristics for the development of a community or community recreational area; e.g., accessibility, water supply, soils to safely handle waste disposal, topographical suitability. Contrary to the Forest Service's position, the statute simply does not require a showing of "need" for the land or of an expressed "plan" to use the land for a particular purpose that satisfies a Regional Forester.

The Forest Service, through its "reasonable expectancy" requirement, is seeking to retain a federal veto over land selections otherwise "suitable" under the express statutory criteria by allowing it to implement a fundamentally undefined "reasonable expectancy" requirement. But this is precisely

what Congress sought to prevent when it granted the land selections to Alaska at the time of statehood. In adopting the Act, Congress recognized that federal land dominance had been

> carried to extreme lengths in Alaska, to a point which has hampered the development of such resources for the benefit of mankind. As a result, a long list of potential basic industries in the Territory . . . can exist in Alaska only as tenants of the Federal Government and on the sufferance of the various Federal agencies. The committee considers that to be an unhealthy situation . . . [and] feels that [such a restrictive] policy must be changed if Alaska is to be a success.

H.R. Rep. No. 624, *reprinted in* 1958 U.S. Code Cong. & Ad. News, 2933, 2937-39. The land grants were thus intended to free Alaska from the federal control sought here by the Forest Service.

The Court of Appeals erred in its reading of both the statute and the legislative history in affirming the Forest Service's "reasonable expectancy" requirement. Because the Court of Appeals wrongly decided an issue of vital importance to Alaska concerning the disposition of approximately 550,000 acres of public lands[12], this Court should grant plenary review.

I. The Forest Service Has Unduly Restricted Alaska's Statehood Land Grants By Imposing Requirements Contrary To The Plain Meaning Of The Statehood Act.

This dispute focuses on the meaning of the Section 6(a) language that Alaska is "hereby granted and . . . entitled to select" from national forest lands "suitable for prospective community centers and recreational areas."

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[12] The Section 6(a) grant was for 400,000 acres in the national forests, of which approximately 250,000 acres has been selected and approved by the Forest Service, and an additional 400,000 acres from other public lands, of which virtually none has yet been selected.

Although the Act defines neither "suitable" nor "prospective," both terms have unambiguous meanings in this context. According to common usage, "suitable" means "adapted to a use or purpose"; "appropriate from a viewpoint of . . . fitness" (*Webster's Third New International Dictionary,* Unabridged ed. (1966)) or "fit and appropriate for the end in view" (*Black's Law Dictionary* 1386 (5th ed. 1979)). "Prospective" means "concerned with or relating to the future." *Webster's Third New International Dictionary,* Unabridged ed. (1966). To be suitable for prospective use as a community center and recreational area, therefore, a site must be capable of supporting development or have the appropriate characteristics that make it fit for such use in the future. Thus, the plain meaning of the language creates an objective standard of physical suitability.

Even the Forest Service acknowledged this plain meaning when it concurred that, from the viewpoint of physical characteristics, "most of the tracts . . . are 'suitable'." C.R. 21. But, the Forest Service nonetheless disapproved substantial selections for failure to prove a "reasonable expectancy" that the grant's purpose of furthering the development and expansion of communities would be accomplished to the satisfaction of the Forest Service. FSM 5454, App. E-1; Appellee's E.R. 1-13. The Forest Service never formally defined "reasonable expectancy" nor did it establish any standards in its guidelines to govern the implementation of the new requirement. Alaska later learned through the selection disapproval letters that "reasonable expectancy" apparently meant that "suitable" had become "needed" (i.e., formally requested by a particular community) and that "prospective" had become "planned" (i.e., expressed intention to locate a new community). Appellees E.R. 1-13.

The Forest Service's construction of the Act is simply wrong. The unambiguous terms of the Act are "suitable," which means fit, not needed or necessary, and "prospective," which means pertaining to the future, not planned. There is nothing whatsoever in the Act's straightforward language to

support the Forest Service's "reasonable expectancy" requirement. The Act establishes an objective standard of physical suitability and nothing more. As dissenting Judge Schroeder stated:

> [i]n insisting that the communities already be planned or in existence, the Service ignores the language of the statute which requires only that the land be suitable for prospective community development.

App. A-23. Similarly, the district court found that:

> [t]his 'reasonable expectancy' requirement is contrary to law . . . . Land selected for prospective community centers and for recreation areas must be suitable for that purpose. Any additional requirements are contrary to the plain language of the statute.

App. B-28.

Moreover, the Forest Service has applied an unpublished guideline that there is no "reasonable expectancy" of community use if a prospective recreational site is more than 25 nautical miles from an existing community or from a site where Alaska expressly intends to place a new community. The 25 mile guideline is based on the assumption that the outside limit for community-based recreation is waterborne day trips in which residents travel two hours in a slow moving boat, "recreate" four hours, and return home again in two hours. *See* Affidavit of John Sandor, Regional Forester, C.R. 20; Appellants' E.R. 40-41. This is an entirely arbitrary construction that finds absolutely no support in the Act and bears no relationship to Alaskans' land uses. The residents of these remote areas extensively use water and air transportation to pursue aggressively the most suitable sites for wilderness recreation, subsistence, and the development of resource based livelihoods. C. R. 21. Therefore, as the dissenting judge in circuit court below stated:

> [t]he Forest Service's wholly arbitrary 25-mile requirement is not even hinted at in the statute or its history . . . .

> The only justification which the Forest Service offers for such an arbitrary standard is that the 25-mile restriction is reasonable as a distance for non-overnight recreation. The rule might make sense for suburban New Jersey. In Alaska, where residents routinely travel by plane and boat due to the scarcity of roads, such a limitation is impractical. When Congress authorized the Secretary of Agriculture to approve Alaska's land selections, it did not authorize disapproval on an arbitrary and irrational basis.

App. A-23-24.

The Forest Service argues that the "reasonable expectancy" requirement serves to prevent pretextual selections because the Forest Service contends that, if the term "suitable" is applied in its plain and ordinary meaning, most of the national forests would be "suitable" for selection. But the district court specifically found that:

> [t]he State's land selection process to date has been run publicly and honestly. There is absolutely no indication in the record that the State is attempting to select land for other than community or recreational purposes. In the absence of pretextual selections, the court finds no reason that the State should not be able to select land anywhere in the National Forest for community and recreational purposes, so long as it is physically suitable for those purposes.

App. B-30. Alaska painstakingly identified the physical characteristics of land suitable to accomplish the Act's purpose; e.g., ease of access, ample water supply, and reasonably flat. Much of the inaccessible, mountainous wilderness in the national forest would not meet this objective standard.

Alaska is, therefore, not improperly expanding the areas in which it can select national forest land. Rather, the Forest Service is improperly restricting the land available for selection to only those sites needed or requested by existing communities or formally planned for new communities and

their recreational areas. At the time of statehood, there were no more than 30 communities in all of this vast region, many so small that they lacked the type of planning board capable of formally designating "need." Furthermore, the expectation that a fledgling state will formally and fully plan new communities even before it has acquired the land for them is entirely unrealistic and unsupported by the legislative history. To add the additional limitation that prospective recreational sites be within 25 miles of those few existing or planned communities is to render the vast majority of the national forests beyond Alaska's selection range. As the district court found:

> [t]here is simply no history or authority for the proposition that Congress intended the State to select only in certain areas of the Forest.

App. B-29

It is clear that Congress, when it adopted the Statehood Act, intended Alaska to identify suitable sites at which prospective community and recreational areas would develop, not to formally plan new cities in the wilderness in only 25 years. Development begins in small steps, not in total community blueprints nor necessarily in "need." Development begins with small industry, like fish hatcheries, or with tourism, by developing recreational areas. Growth follows steadily thereafter. Growth had been stifled by federal land withdrawals and Congress determined that Alaska needed some of that land to encourage the development which, in turn, causes communities to flourish. H.R. Rep. No. 624, *reprinted in* 1958 U.S. Code Cong. & Ad. News, 2937-39. This is especially true in areas such as southeast Alaska where available land is so scarce that simply opening land will promote growth. Ad. Rec. H., C.R. 21. Alaska chose the best lands on which the opportunity for exactly such development existed. Requiring more formal proof of planning a new community, as the Forest Service would require, or of "the likelihood that people will move there," as the court below would require, is beyond the terms of the Act and plain common sense. App. A-20.

II. The Forest Service's Interpretation Squarely Contradicts Congress' Prevailing Objective of Encouraging Alaska's Development by Removing The Burdensome Control Of Federal Agencies.

When Congress created Alaska as a sovereign state, Congress repeatedly stated that the vast federal land holdings in Alaska had retarded the development of the territory. Granting federal land to the new state was necessary to encourage growth, development, the expansion of communities and recreational areas, and basic economic viability.

> Basically, the new State of Alaska would be granted the right to select 103,350,000 acres of land now owned by the federal government. . . . Part of this grant — 800,000 acres — will be for the express purpose of community development and the expansion of recreational areas. The remainder will be for the purpose of getting the land out of federal ownership and into the tax rolls to help expand the existing base for self-government.
>
> These grants should be considered in light of the fact that 99.9 per cent of the entire land area of Alaska is owned by the Federal Government. State ownership of some of these lands will provide the necessary encouragement for the complete and efficient development of the natural resources they contain. Just as previous states received land for railroads and schools and other purposes, Alaska would be given land with which to encourage the internal improvements necessary to her future growth and development.

1958 Cong. Rec. Senate pp. 12011-12012. (Sen. Jackson, floor leader of the bill).

Previous statehood acts granted land to newly formed states by designating specific townships. However, Congress determined that because of the overwhelming federal land holdings and the inaccessibility of much of the land, the standard township formula would not work in Alaska. Federal

management of its remaining lands would be hampered by checkerboard ownership and the newly created state would not necessarily receive lands that could be used to promote and sustain a viable state. Instead, at statehood Alaska was granted fixed acreages from different land bases to be selected within 25 years, as the state developed its own goals for its future as well as its own abilities to manage its lands. 1958 U.S. Code Cong. & Ad. News, 2737-38; 104 Cong. Rec. 12011-12 (1958); *See* Gates, Paul, *History of Public Land Law Development* 316 (1968).

Thus, Section 6(a) was written as a clear and direct grant — Alaska "is hereby granted and shall be entitled to select . . . from lands within national forests . . . not to exceed four hundred thousand acres" — but the actual selection was deferred to afford the newly sovereign state the opportunity to determine the best use for the only lands it would receive in its southern regions. In granting selection rights in lieu of townships, Congress made clear its view that Alaska, rather than federal agencies, was now to resolve such intensely local issues as where prospective community centers and recreational areas could best develop:

> The committee feels strongly that this practice [federal reservations and withdrawals] has been carried to extreme lengths in Alaska, to a point which has hampered the development of such resources for the benefit of mankind. As a result, a *long list of potential basic industries in the Territory, including . . . the tourist industry, . . . can exist in Alaska only as tenants of the Federal Government and on the sufferance of the various Federal agencies. The Committee considers that to be an unhealthy situation . . .* [and] feels that [such a restrictive] . . . policy must be changed if Statehood for Alaska is to be a success. (Emphasis added).

H.R. Rep. No. 624 *reprinted in* 1958 U.S. Code Cong. & Ad. News, 2933, 2937-39. Congress never intended Alaska to once again, despite achieving statehood, develop only on the "sufferance" of a federal agency. Congress granted Alaska

national forest lands to create its entire future in those areas; it never intended to authorize the Forest Service to determine just where that future should be. *See Cooper v. Roberts*, 59 U.S. 173, 182 (1858).

Section 6(a) does provide that the "lands shall be selected with the approval of the Secretary of Agriculture." This is the standard formula found in statehood acts where Congress granted land selection rights. Contrary to the Forest Service and the Ninth Circuit, the "approval" language is not a license for the Forest Service to substitute its judgment for what is "suitable" for promoting communities. This Court has consistently interpreted similar "approval" language as authorizing the Secretary designated in the act to determine only whether the state has met the statutory criteria. *Payne v. Central Pac. Ry. Co.*, 255 U.S. 228, 236 (1921); *Payne v. New Mexico*, 255 U.S. 367, 371 (1921); *Wyoming v. United States*, 255 U.S. 489, 496 (1921).

> The selections are to be made by the grantee, not by the Secretary . . . . True, the act provides that they shall be made under the Secretary's direction, but this merely applies to them the general rule . . . that the administrative execution of all public land laws is to be under his 'supervision' and 'direction'. Its purpose is to make sure that . . . the right of selection is not abused, that claims . . . and the like are not disturbed . . . and that the lands selected are such as are subject to selection. But, of course, it does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress, as manifested in the granting act. (Citations omitted).

Payne v. Central Pac. Ry. Co., 255 U.S. 228, 236 (1921). Land selections by states, particularly under statehood acts, have never been characterized as proposals for uses subject to the satisfaction of a federal agency.

The rationale for this longstanding rule is that statehood acts are compacts between a sovereign state and the federal

government. This Court has long recognized the sanctity of such compacts and has held consistently that statehood acts confer valid and enforceable rights on the state which may not be subsequently defeated or materially diminished without express congressional authorization. *United States v. Morrison*, 240 U.S. 192, 201-202 (1916); *Stearns v. Minnesota ex rel. Marr*, 179 U.S. 223, 244 (1900); *Beecher v. Wetherby*, 95 U.S. 517 (1877); *Cooper v. Roberts*, 59 U.S. 173, 177 (1858).

This rule was reasserted in 1980 in *Andrus v. Utah*, 446 U.S. 500. There, the Court had to determine if the Secretary of Interior had authority to limit Utah's school indemnity land selections under that state's enabling act. Following well-established tradition that a statehood compact is "a solemn agreement" more analogous to a contract between private parties than to a general congressional enactment, this Court reviewed the enabling act's grant language that lands are "hereby granted" and are to be selected in the future "with the approval of the Secretary of Interior." 446 U.S. at 502, 507. The Court then held that the Secretary did have the necessary authority because subsequent congressional legislation specifically granted it. 446 U.S. at 520. Indeed, four dissenting members of the Court would have held that even the subsequent legislation was insufficient to defeat a statehood entitlement, particularly where the land grant is stated in fixed acreages. 446 U.S. 500, 520-539 (Powell, J. dissenting, joined by Burger, C.J., Blackmun, J. and Rehnquist, J.).

Despite this long history of deference to statehood compacts, the court below found that the nature of the Alaska Statehood Act as a compact did not limit the Forest Service's role to a procedural function of verifying that Alaska's selections met the statutory criteria. App. A-7. This is clearly erroneous. Section 4 of the Alaska Statehood Act specifically denominates the Act a compact in which Alaska disclaimed all right or title to any lands not specifically granted by the Act and relinquished all power to tax lands held by the United

States government in exchange for the acquisition of the lands specifically granted. Alaska also relinquished in Section 6(1) its rights to certain other traditional statehood grants, rendering the land grant at issue the subject of a contract for which precise consideration had been given. Alaska has adhered to the statehood bargain but, because of the decision below, has not received the benefits of that bargain. Alaska's only land base in one of its most precious regions has been severely restricted by an arbitrary and unreasonable interpretation of its statehood compact with the federal government.

Compacts are the keystone of our federal system and are entitled to respect. Allowing the Forest Service to improperly restrict Alaska's lawful selections by substituting its judgment for Alaska's on community development defeats the entire purpose of the Statehood Act. This is especially troubling because the Forest Service has failed to establish any standard or definition for its "reasonable expectancy" requirement, leaving fundamentally important decisions such as where and how Alaska's community development can occur to the subjective, *ad hoc* determination of a Regional Forester. Moreover, the Forest Service failed to announce publicly critical guidelines in advance. How could Alaska meaningfully select sites in 1977 without knowing that in 1979 the Forest Service would apply a 25 mile limit for prospective community recreational areas?

Under the Forest Service's interpretation, Alaska is once again, despite statehood, planning its future dependent "on the sufferance" of a federal agency. Alaska's marine park highway selections, chosen to serve residents' recreational use patterns and to promote tourism, were disapproved because Alaska:

> expressed [no] intention of establishing or promoting communities at or nearby sites proposed for inclusion in a marine parks system. A marine recreation system can and is being accommodated by the Forest Service under existing authority to manage National Forest system lands . . .[13]

[13] Affidavit of John Sandor, Regional Forester, Alaska Region of the U.S. Department of Agriculture, Forest Service. C.R. 20. Appellants' E. R. 42-43.

State selections for fish hatchery sites to promote aquaculture based economies were disapproved because:

> [f]ish hatcheries alone do not normally generate community development.... No request by the State for a special use permit to construct and operate a fish hatchery facility on National Forest system land in Alaska has... ever been denied![14]

In other words, the Forest Service will "accommodate" Alaska's plans while retaining land ownership itself to insure that the Forest Service's own land management goals are not inconvenienced. This is precisely what Congress intended to prevent when it stated that:

> [s]tate ownership of valuable, accessible timber lands and other lands... is intended to encourage the development and expansion of communities and recreational areas.

S. Rep. No. 1163, 85th Cong., lst Sess. 16 (1957).

In summary, the decision below validates an unreasonable interpretation of Alaska's statehood compact with the United States government. The result of the decision below is to thrust the state into a planning dilemma where its land selections are subject to the vagaries of fluctuating, subjective, and *ad hoc* determinations of a Regional Forester with his own agenda for the same lands. Imbuing the Regional Forester with such unfettered and unwarranted authority is to legitimize an erosion of established federal state relations to an unprecedented degree. Congress never intended such a result. To the contrary, Congress had concluded that federal management of the substantial reservations of federal lands in Alaska, including the national forest lands, had historically hindered development of communities in Alaska. Congress believed that the national forest grant would free at least some of those lands from the restrictive effect of federal policies and allow those lands to be used and administered for state and local goals and aspirations rather than for those set by a distantly controlled federal bureaucracy. The Ninth Circuit's decision to reverse the district court was erroneous.

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[14] *Id.*, Appellant's E.R. 43-44

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be reviewed and reversed by this Court. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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December 22, 1986

APPENDIX A

STATE OF ALASKA, Plaintiff-Appellee,

v.

RICHARD E. LYNG,* Secretary of Agriculture, R. MAX PETERSON, Chief, United States Forest Service, and MICHAEL A. BARTON, Alaska Regional Forester, and their respective successors in office, Defendants-Appellants.

No. 85-3992

OPINION

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

Argued and Submitted June 3, 1986

Decided Aug. 20, 1986.

Before: WRIGHT, SNEED and SCHROEDER, Circuit Judges.

WRIGHT, Circuit Judge:

In this case we are asked to decide the reasonableness of the Forest Service's

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* Successor to John R. Block, Fed. R. App. P. 43(c).

interpretation of the Alaska Statehood Act. The Service requires that land grant selections from national forests have a community nexus before they will be approved. The district court held that the Service's interpretation was unreasonable and granted summary judgment for Alaska. We reverse.

FACTS AND PROCEEDINGS BELOW

Prior to statehood, the vast majority of land in Alaska was owned by the federal government. To facilitate economic development and community expansion, Congress made several land grants to the state in the Alaska Statehood Act. Under Section 6(a) of the Alaska Statehood Act, the state may select up to 400,000 acres of land from the national forests, "with the approval of the Secretary of Agriculture."[1/]

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1 Section 6(a) states in relevant part:

In December 1977, Alaska filed selections totaling 247,597 acres in the Chugach and Tongass National Forests. In

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[1] continued

> For the purposes of furthering the development of and expansion of communities, the State of Alaska is hereby granted and shall be entitled to select, within thirty-five years after the date of the admission of the State of Alaska into the Union, from lands within national forests in Alaska which are vacant and unappropriated at the time of their selection not to exceed four hundred thousand acres of land, and from the other public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection not to exceed another four hundred thousand acres of land, all of which shall be adjacent to established communities or suitable for prospective community centers and recreational areas. Such lands shall be selected by the State of Alaska with the approval of the Secretary of Agriculture as to national forest lands and with the approval of the Secretary of the interior as to other public lands . . .

Pub. L. No. 85-508, 72 Stat. 339, 48 U.S.C. prec. 21.

a series of decisions in 1979, the Regional Forester disapproved 51,050 acres of those selections after determining they did not qualify under the conditions of the statute.

The decision of the Regional Forester was affirmed by the Chief of the Forest Service in October 1979. After the Secretary of Agriculture declined review, Alaska filed this action in federal district court. The court granted Alaska's motion for summary judgment, holding the Secretary's interpretation of the statute was contrary to law. The Secretary has appealed.

STANDARD OF REVIEW

We review de novo a grant of summary judgment. Planet Insurance Co. v. Mead Reinsurance Corp., No. 85-1535, slip op. at 4 (9th Cir. May 6, 1986). The construction of a statute is a question of law reviewable de novo. United States v.

Louisiana-Pacific Corp., 754 F.2d 1445, 1447 (9th Cir. 1985).

The APA requires that a reviewing court hold unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, 5 U.S.C. § 706(2)(A), and actions in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, id., § 706(2)(C).

The interpretation of a statute by the agency charged with its administration is granted substantial deference. Udall v. Tallman, 380 U.S. 1, 16 (1965); Kidd v. United States Department of Interior, Bureau of Land Management, 756 F.2d 1410, 1412 (9th Cir. 1985). If the statute is silent or ambiguous with respect to the specific issue, the court may not substitute its own construction for a reasonable interpretation made by

the agency. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).

To affirm, we need not conclude that the agency's construction was the only one it could have adopted, or even the one the court would have reached. Alcaraz v. Block, 746 F.2d 593, 606 (9th Cir. 1984). Deference requires affirmance of any interpretation within the range of reasonable meanings the words permit, comporting with the statute's clear purpose. Id.

The courts, however, are the final authorities on issues of statutory construction, Volkswagenwerk Aktion v. Federal Maritime Commission, 390 U.S. 261, 262 (1968); Markair, Inc. v. Civil Aeronautics Board, 744 F.2d 1383, 1385 (9th Cir. 1984), especially where the construction requires consideration of

broad concerns beyond the agency's expertise. Grunfeder v. Heckler, 748 F.2d 503, 505 (9th Cir. 1984) (en banc).

A court must reject administrative constructions of a statute inconsistent with a statutory mandate or that frustrate the policy that Congress sought to implement. Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981); United States v. Louisiana-Pacific Corp., 754 F.2d at 1447.

Alaska argues that no deference is due the Forest Service here because the Alaska Statehood Act is not an act that it administers. It contends that the Act is a contract between two sovereigns creating rights in the state, and the Forest Service's approval is only a procedural function. This argument is without merit.

The Supreme Court has held that the "approval of the Secretary" power conferred under land grant statutes gives the Secretary the authority and the duty "to determine the lawfulness of the selections." Wyoming v. United States, 255 U.S. 489, 503-04 (1920); Payne v. New Mexico, 255 U.S. 367, 371 (1920). Accord Andrus v. Utah, 446 U.S. 500, 511 (1980); Lewis v. Hickel, 427 F.2d 673, 676 (9th Cir. 1970), cert. denied, 400 U.S. 992 (1971); Ferry v. Udall, 336 F.2d 706, 710, 713 (9th Cir. 1964), cert. denied, 381 U.S. 904 (1965).

The "action of the Secretary [is] required, not merely as supervisory of the action of the agent of the state, but for the protection of the United States against an improper appropriation of their lands." Wisconsin Cent R. Co. v. Price County, 133 U.S. 496, 512 (1890). Alaska's sovereignty did not prevent it

from consenting to administration of the land grants by the Secretary as a condition of receiving the grants.

Alaska also argues that deference is improper here because the standards used by the Forest Service have not been promulgated as regulations.[2/] However, deference to an administrative interpretation of a statute is appropriate whether or not it has been embodied in a regulation. Western Pioneer, Inc. v. United States, 709 F.2d 1331, 1335 (9th Cir. 1983).[3/]

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2 Contrary to the Forest Service's assertion, the Secretary of Agriculture has promulgated no regulations giving the standards to be met before selections are approved. The regulation cited by the Forest Service, 43 C.F.R. § 627, was promulgated by the Secretary of the Interior and establishes only the administrative procedure for filing land selections.

3 Alaska has not challenged the Forest Service's failure to comply with the notice and hearing requirements of the A.P.A. These requirements generally do not apply to matters relating to public property or grants. 5 U.S.C. § 553(a)(2).

ANALYSIS

I. Community Nexus

A. Introduction

The Forest Service refused to approve several Section 6(a) selections submitted by Alaska as suitable for prospective recreational areas. It required such areas to be near (generally within 25 nautical miles of) existing communities, proposed by existing community governments or planning boards as community areas, or at or near an area where there had been an expressed intention of establishing new communities.

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[3] continued

However, the Department of Agriculture has decided voluntarily to impose these requirements on all agencies of the Department when making rules relating to public property or grants. 36 Fed. Reg. 13,804 (1971); Alcaraz, 746 F.2d at 611. Because the district court has not considered this issue, we will not do so. See United States v. Kupau, 781 F.2d 740, 742 (9th Cir. 1986).

B. Statutory Language

Section 6(a) requires that all selections of land under this subsection "shall be adjacent to established communities or suitable for prospective community centers and recreational areas."[4/] The Forest Service has interpreted "prospective community" in this clause to modify both "centers" and "recreational areas." Alaska, on the other hand, would not read "prospective community" to modify "recreational areas."

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4 The parties have argued whether the word "and" in this phrase is conjunctive or disjunctive. This is not determinative, as "community" could modify "recreational areas" under either reading. Furthermore, this phrase makes sense only if "and" is read disjunctively. Otherwise, any lands granted under the "suitable for" phrase would have to be suitable both for prospective community centers and, at the same time, for prospective recreational areas. Even the Forest Service does not insist on such an interpretation.

In construing a statute, we look first to the language of the statute itself, and second to its legislative history and, as an aid in interpreting Congress' intent, the interpretation of its administering agency. Brock v. Writers Guild of America, West, Inc., 762 F.2d 1349, 1353 (9th Cir. 1985). We look to the legislative history if the statutory language is unclear. Blum v. Stenson, 465 U.S. 886, 896 (1984). However, even where the meaning of the words is plain, the circumstances of the enactment of legislation may persuade us that Congress did not intend words of common meaning to have their literal effect. Id. at 266; Heppner v. Alyeska Pipeline Service Co., 665 F.2d 868, 870 (9th Cir. 1981).

Here, the phrase in question is susceptible to either asserted interpretation and is ambiguous. We look to

Congress' intent to shed light on its meaning.

Section 6(a) states its purpose. The land grants under this section are "[f]or the purpose of furthering the development of and expansion of communities." This purpose supports the Forest Service's "commuity [sic] nexus" interpretation.

The relationship between the land grants in Section 6(a) and Section 6(b) also supports the Forest Service's interpretation. Section 6(a) provides for two 400,000 acre grants, one from National Forests and one from other public lands. Section 6(b) provides for a grant of 102.5 million acres from public lands.[5/] If no

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[5] Section 6(b) reads in relevant part:

> The State of Alaska, in addition to any other grants made in this section, is hereby granted and shall be entitled to select, within

community nexus were required, Section 6(a) public land grants would be almost as unrestricted as Section 6(b) grants, since virtually any site may be classified as suitable for a prospective recreational area. The grant of public lands in Section 6(a) would in substance be rendered surplusage, as Congress could have simply provided for a larger Section 6(b) grant. We must read the statute as a whole to avoid such a result. See Richards v. United States, 369 U.S. 1, 11 (1962); United States v. Menasche, 348 U.S. 528, 538-39 (1955).

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[5] continued

> thirty-five years after the admission of Alaska into the Union, not to exceed one hundred and two million five hundred and fifty thousand acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection . . .

C. Legislative History

Purposes of the Alaska Statehood Act included developing Alaska's economy, H.R. Rep. No. 624, 85th Cong., 1st Sess. 1, 9, reprinted in U.S. Code Cong. & Ad. News 2933, 2933 [sic], 2941 (1957) and resources, id. at 2936, and decreasing the amount of federally owned land in Alaska. Id. at 5, 7, U.S. Code Cong. & Ad. News at 2937, 2939. See also S. Rep. No. 1163, 85th Cong., 1st Sess. 1 (1957). However, these purposes are much more general than the specific purpose statement in Section 6(a). The specific purpose of Section 6(a) overrides the general purposes of the Act. See Markair, 744 F.2d at 1385.

The House Report specifies that Section 6(a) grants are to be "adjacent to established communities or suitable for prospective community or recreational areas." H.R. Rep. No. 624, 85th Cong., 1st Sess. 6, reprinted in U.S. Code Cong.

& Ad. News 2933, 2938 (1957). This suggests that a "recreational area" need not be a "community recreational area." The Senate Report specifies that this land is "for community expansion and recreational sites." S. Rep. No. 1163, 85th Cong., 1st Sess. 2 (1957). Like the phrase in Section 6(a), this is ambiguous. However, the Senate Report also specifies that Section 6(a) grants will create "[s]tate ownership of valuable, accessible timberlands and other lands" which in turn "is intended to encourage the development and expansion of communities and recreational areas." Id. at 16. This tends to support Alaska's contention that "recreational areas" is not modified by "community."

The Forest Service relies heavily upon the legislative history of an Alaska statehood bill considered by Congress in 1954. This bill had language identical to

that under consideration here. Such prior legislative history can be relevant to an understanding of the act. See United States v. Enmons, 410 U.S. 396, 404 n.14 (1973). We need not decide what weight should be given this legislative history.

We find the 1957 legislative history ambiguous. In light of the community emphasis in the purpose clause and the relationship between Section 6(a) and Section 6(b), the Forest Service's interpretation is reasonable.

II. Adjacent

Under Section 6(a), land selected must be "adjacent to established communities or suitable for prospective community centers and recreational areas." The Forest Service has interpreted "adjacent" broadly to mean "near to, but need not be adjoining, an established community." FSM 5455[sic].22(4)(a)(2). It

generally has approved recreation selections within 25 nautical miles from an existing community. This interpretation is reasonable.

The Service's requirement that land granted as suitable for prospective community recreational areas be within 25 miles of existing communities or lands "suitable for prospective community centers" is also reasonable. It gives similar tests for recreational areas near "established communities" and for those near areas "suitable for prospective community centers," making the clause internally consistent.

III. Suitable

The Service interprets "suitable" to mean "there must be a reasonable expectancy that the site will be developed for these purposes." FSM 5455[sic].22(4)(a)(1). For a location to be suitable as a prospective community center, the Service

requires an expressed intention of establishing a new community at or near the site. For a location to be suitable as a prospective recreational area, it requires that an existing community government or planning board propose the site for its community recreation plans or program, in addition to the requirement that the site be "near" the established community.

Alaska argues that this interpretation is unreasonable. From the plain meaning of the language, Alaska contends, Congress did not require these sites to be "expected" to develop into communities and recreational areas. It required only that the sites be "suitable for such uses." "Suitable" does not require an "expressed intention" that something be used for a particular use or purpose; it requires only that the thing be adaptable to such use or purpose.

We disagree. Because the stated purpose of the grant is to further community development and expansion, it is not unreasonable to require the state to show some expectancy that the land will be used for those purposes. One factor going into a determination of suitabliity, from a land use planning standpoint, is the likelihood that people will move there. If this is not considered, almost any site could be found "suitable" for community purposes.[6/]

IV. Arbitrary and Capricious

Alaska argues that the Forest Service has applied its criteria in an arbitrary and capricious manner. This issue was presented to, but not decided by, the district court. We may consider an issue

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[6] Because we find the Forest Service's interpretation of the statute to be reasonable, we do not reach its contention that Congress has acquiesced in this interpretation.

conceded or neglected below if the issue is purely one of law and the pertinent record has been fully developed. In re Howell, 731 F.2d 624, 627 (9th Cir.), cert. denied, __ U.S. ___, 105 S. Ct. 330 (1984). The issue here involves the application of law to fact, and we decline to reach it.

CONCLUSION

We reverse the summary judgment for Alaska and remand to the district court for futher proceedings, including a determination whether the Forest Service has applied its selection criteria in an arbitrary and capricious manner.

SCHROEDER, Circuit Judge, concurring in part and dissenting in part.

I agree with the majority that the Alaska Statehood Act requires the state's land selections to have some nexus to existing or prospective communities. That interpretation resolves an ambiguity in the Act in a manner that is fully supported by the legislative history.

I cannot agree with the majority, however, when it upholds the Forest Service requirement that the selections generally be within 25 miles of existing or already planned communities. The Alaska Statehood Act permits the state to select "from lands within national forests in Alaska which are vacant and unappropriated." It requires that the land either be "adjacent to established communities" or, in the alternative, be "suitable for prospective community centers and recreational areas."

Pub. L. No. 85-508, 72 Stat. 339, 48 U.S. [sic] prec. 21 § 6(a). The Forest Services's wholly arbitrary 25-mile requirement is not even hinted at in the statute or its history. In insisting that the communities already be planned or in existence, the Service ignores the language of the statute which requires only that the land be "suitable for prospective" community development.

The only justification which the Forest Service offers for such an arbitrary standard is that the 25-mile restriction is reasonable as a distance for non-overnight recreation. The rule might make sense for suburban New Jersey. In Alaska, where residents routinely travel by plane and boat due to the scarcity of roads, such a limitation is impractical. When Congress authorized the Secretary of Agriculture to approve Alaska's land

selections, it did not authorize disapproval on an arbitrary and irrational basis. Accordingly, in my view, the majority does not hold the Forest Service to an appropriate standard.

I therefore respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

STATE OF ALASKA
Plaintiff,

vs.

JOHN R. BLOCK, Secretary of Agriculture, R. MAX PETERSON, Chief, United States Forest Service, and JOHN A. SANDOR, Alaska Regional Forester, and their respective successors in office,
Defendants.

MEMORANDUM AND ORDER

A81-311 CIV

THIS CAUSE comes before the court on the parties' cross-motions for summary judgment. This case involves certain of Alaska's land selections of National Forest lands under Section 6(a) of the Alaska Statehood Act. Under Section 6(a), in 1977 Alaska filed applications for approximately 250,000 acres of National Forest lands. The Regional Forester, and ultimately the Secretary of Agriculture,

disapproved approximately 50,000 acres of that selection.[1]

The lands disapproved were lands selected by the State for addition to the State park systems and/or fish hatchery sites. The Forest Service, in disapproving these selections, held that Section 6(a) required that land selections have a "community nexus," and therefore required the State to show that the land selections were for use by an existing or prospective community. It found that recreational land selections more than 25 nautical-travel miles from a community were generally for regional or state-wide recreational use, as opposed to community-based

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[1] This action only concerns that part of the Secretary's decision that disapproved certain land selections. The decision to approve certain other selections is not before the court. Given that the court finds that the Forest Service's selection criteria were unduly strict, this opinion does not disturb any prior approval, and the court considers those approvals to be final.

recreational use, and therefore not selectable under the Statehood Act. The case is before this court on appeal from the final administrative determination of the Secretary of Agriculture.

At this juncture the appeal involves one major issue: whether the Forest Service erred in interpreting Section 6(a) as requiring a community-nexus for State selections from National Forest lands. The judicial standard of review, contained in the Administrative Procedures Act, requires that the action of the Secretary be upheld unless it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "in excess of statutory . . . authority." 5 U.S.C. § 706(2)(A), (C). Given the issue is one of statutory interpretation, the focus of the court will be whether the Secretary's interpretation of the statute was contrary to law.

Initially, the State argues, and the federal government agrees, that the language in Section 6(a) that provides that selection by the State shall be "with the approval of the Secretary of Agriculture" does not grant the Secretary discretionary authority to disapprove grants that otherwise meet the criteria of 6(a). The court agrees. See Wyoming v. United States, 255 U.S. 489, 496-97 (1921); Payne v. New Mexico, 255 U.S. 367, 371 (1921); Payne v. Central Pacific Ry. Co., 255 U.S. 228, 236 (1921). As the Supreme Court noted in Payne v. New Mexico, the words "subject to the approval of the Secretary" in a land grant has the purpose of casting

> upon the Secretary the duty of ascertaining whether the selector is acting within the law; in respect of . . . the land selected, and of approving or rejecting the selection accordingly. The power conferred is "judicial in its nature" and not only involves the authority but implies the duty "to determine the lawfulness of the selections. . . ."

255 U.S. at 371.

I. The Statute's Language

The language of the statute is the starting point for statutory interpretation.[2] The current dispute involves

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[2] Section 6(a) of the Alaska Statehood Act provides:

> Section 6.(a) For the purposes of furthering the development of and expansion of communities, the State of Alaska is hereby granted and shall be entitled to select, within thirty-five years after the date of the admission of the State of Alaska into the Union, from lands within national forests in Alaska which are vacant and unappropriated at the time of their selection not to exceed four hundred thousand acres of land, and from the other public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection not to exceed another four hundred thousand acres of land, all of which shall be adjacent to established communities or suitable for prospective community centers and recreational areas. Such lands shall be selected by the State of Alaska with the approval of the Secretary of Agriculture as to national forest lands and with the approval of the Secretary of the Interior as to other public lands. . . .

See Public Law 85-508, 72 Stat. 339 § 6a[sic](a) (1958) (as amended).

the interpretation of the phrase: "all of which shall be adjacent to established communities or suitable for prospective community centers and recreational areas." (emphasis added) The Forest Service has interpreted this language narrowly as requiring recreational areas to be community recreation areas.[3] The State, on the contrary, argues that "prospective community centers and "recreational areas" are two separate bases for land selection.

If the words are given their plain and ordinary meaning, then the State's

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[3] The federal government's brief becomes extremely vague in its discussion of this phrase. It states:

> The Forest Service has consistently interpreted the phrase "prospective community centers and recreation areas" as one standard rather than two separate bases for selection. That is, a recreation area may be selected when it is adjacent to an existing community or associated with a prospective community center.

Federal SJ brief at 38.

interpretation is more satisfactory. First, the preferred reading of the phrase would be to make two bases for selection, "prospective community centers" and "recreational areas". This is simply the most "common-sense" reading of the phrase.[4] Second, the phrase "recreational areas" is nowhere modified by the word "community". The word "community" in the phrase "prospective community centers" only modifies "centers," not "recreational areas." To decide otherwise would mean the phrase would read as follows: "or suitable for prospective community centers and [prospective community] recreational areas. [sic] Such an interpretation is unreasonable because it creates separate standards

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[4] The Court finds that the word "and" does not require that phrase be read as one standard. See 1A Sands, Sutherland Statutory Constuction § 21.14 (1972). As discussed below, the phrase makes sense only if the "and" is read disjunctively.

for selecting recreational land in connection with established communities and prospective communities. Under the government's interpretation of the language, recreational land must be "adjacent" to existing communities, but merely needs to be "associated" with a prospective community. See Federal Summary Judgment Brief at 38. It is unreasonable to assume that Congress would create two different standards for the selection of recreational lands depending on whether or not the community was established.

II. Purpose Clause

The federal government argues that the purpose clause of Section 6(a) must be given "substantive effect." In other words, it maintains that the phrase "[f]or the purposes of furthering the development and expansion of communities" is a substantive restriction on the state's use of the land. The cases relied on by the

government to support this argument are all distinguishable, however. In those cases, grants were made for very specific purposes, i.e., to support universities, schools, insane asylums, miner's hospitals, the building of a canal, etc. The purpose in Section 6(a), "furthering the development and expansion of communities," is much more general and vague. Further, in 6(a), Congress placed specific limits on the grant elsewhere in the section. It is therefore unlikely that the purpose clause was intended to be an additional substantive limit on land selections. Accordingly, the court finds that the purpose clause is not substantive. It is, nevertheless, an expression of congressional intent that deserves considerable weight. See 2A N. Singer, Sutherland Statutory Constitution [sic] § 46.03 (4th ed. 1984 revision).

It is a canon of statutory construction that a statute must be read so as to produce a harmonious whole, and that every phrase must be given effect. Id. §§ 46.05, 46.06. The Statehood Act, therefore, should not be interpreted in a manner that will produce a conflict between Section 6(a)'s purpose clause and selection criteria. Unlike the federal government, however, the court does not find that allowing the State to select non-community-linked recreation lands conflicts with the purpose of furthering the development of communities.

Congress, in enacting the Statehood Act, was not only concerned with the physical development and expansion of communities, as the government argues, but was concerned with their economic development as well. See, e.g., H.R. Rep. No. 624, 85th Cong., 1st Sess. (1958), reprinted in 1958 U.S.C.C.A.N. 2933, 2937-

39; 1958 Cong. Rec. S12011-12 (1958) (statement of Sen. Jackson). Congress was clearly concerned that too much federal ownership of land would stifle economic development in the state. Congress particularly wished to encourage the development of tourism, an industry that requires recreational lands. 1958 U.S.C.C.A.N. at 2939. Allowing the State to develop a park system in Southeast Alaska will assist the Southeast communities to develop economically through the promotion of tourism, and thereby further the congressional purpose.

Further, the land grant provisions in the Statehood Act serve a remedial purpose and therefore must not be construed strictly to defeat their purpose. See, e.g., Leo Sheep Co. v. United States, 440 U.S. 668, 682-83 (1979); Wyoming v. United States, 255 U.S. 489, 508 (1921); United States v. Denver and Rio Grande Ry.

Co., 150 U.S. 1, 15 (1893). A strict interpretation of the Act and purpose clause, as proposed by the government, would act to defeat the land grant's purposes of creating an economic self-sufficient state, furthering economic expansion, and relieving the State from the federal government's stranglehold on Alaskan land.

III. Legislative History

Any remaining uncertainties regarding whether Congress intended that Alaska be allowed to select recreational lands is dispelled by the Act's legislative history. It is clear that the 85th Congress, the Congress that passed the Statehood [sic], intended "recreational areas" to be an independent basis of selection.

It is irrelevent, for the purposes of interpreting Section 6(a) that the Senate abandoned its version of the Statehood Act, S. 49, and passed the house

version, H.R. 7999. The National Forest land selection provisions were identical in both acts. See, e.g. 1958 Cong. Rec. 11944 (statement of Sen. Murray), id. at 12010 (statement of Sen. Jackson, Floor Leader, and section-by-section analysis).

House Report 624 on H.R. 7999 states the following:

> Four hundred thousand acres are to be selected by State authorities . . . within national forests in Alaska which are vacant and unappropriated at the time of their selection. Another 400,000 acres of vacant, unappropriated, and [sic] reserved land adjacent to established communities or suitable for prospective community or recreation areas within 50 years after the new State is admitted.

H.R. 624, 85th Cong., 1st Sess. 6-7 (1957), reprinted in 1958 U.S.C.C.A.N. 2938 (emphasis added).[5] Representative Dawson remarks during debate on the

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[5] This language can also be interpreted as expressing intent that no limitations be placed on the selection of forest service land, but that the limitation on selection only apply to BLM land. See also f.n. 8 infra.

House floor echo the intent found in the Report, i. e., that recreational areas were an independent basis of land selection:

> For the development and expansion of communities, Alaska would be allowed to choose 400,000 acres of vacant and unappropriated national forest lands and another 400,000 acres of vacant, unappropriated and unreserved lands adjacent to established communities or in areas suitable <u>for prospective communities or recreation areas</u>.

1958 Cong. Rec. 9361 (Statement of Rep. Dawson) (emphasis added).

The Senate's view of Section 6(a) is identical. Like the House, the Senate also intended community expansion and recreational areas to be independent bases of selection. The Senate report states on page 2:

> Section 6 of the bill includes some grants for special purposes [i.e., governor's residence, fisheries and game conservation.]. However, the great bulk of the land grant is authorized by subsections 6(a) and 6(b) which allow the State to select within 25 years a total of

> 103,350,000 acres from Federal lands in Alaska, 400,000 acres of this total amount may be selected from national forests, to be used for community expansion and recreation sites.

S. Rep. No. 1163, 85th Cong., 1st Sess. 2 (1957). (emphasis added). Elsewhere it states:

> However, it has been common practice to grant substantial forest lands to other States, whereas Alaska is restricted to 400,000 acres out of the vast Federal forest lands within the State, and even that is for community expansion and recreation areas.

Id. at 3 (emphasis added). Finally, it states:

> Subsection 6(a) authorizes the State of Alaska to select 400,000 acres of land within national forests and an additional 400,000 acres from other public lands. All lands selected under subsection 6(a) must be adjacent to established communities or suitable for prospective community centers and recreational areas.
>
> State ownership of valuable, accessible timber lands and other lands described in this subsection should and is intended to encourage development and expansion of communities and recreational areas.

Id. at 16 (emphasis added).

Finally, this same view was echoed by Senator Jackson, the floor leader of the bill, when he was explaining the provisions of the bill during Senate debate:

> Part of this grant - 800,000 acres - will be for the express purpose of community development and the expansion of recreational areas. The remainder will be for the purpose of getting land out of Federal ownership and onto the tax roles to help expand the existing base of self government.

1958 Cong. Rec. 12011-12 (remarks of Sen. Jackson).

Based on the above history, it is clear that Congress intended that the Section 6(a) land grants serve two purposes, the expansion of communities and the development of recreational areas. Nowhere does Congress express any intent that the recreation areas be community based.

The government relies heavily on the Senate hearings on Alaska statehood

held during 1954 to support its argument that recreational areas must be community based. See A Bill to Provide for the Admission of Alaska into the Union: Hearings on S. 50 Before the Senate Committee on Interior and Insular Affairs, 83d Cong., 2d Sess. 137-140 (1954) (hereinafter 1954 Senate hearing). This reliance is misplaced for several reasons. Most importantly, given a conflict between the Senate's intent in the 83d Congress and the intent of the whole 85th Congress, the intent of Congress that actually passed the Statehood Act controls. The court finds a major difference between the attitudes of the 1954 Senate and the 85th Congress regarding the purpose of Section 6(a). The 1854 [sic] Senate, unlike the 85th Congress, paid little attention to the need for recreation areas in Southeast

Alaska. See S. Rep. No. 1028, 83d Cong., 2d Sess. 4, 7, 29 (1954).[6]

Second, the language under consideration in the 1954 Senate differed considerably from the language of 6(a) as adopted in that the language the Senate committee was considering made no reference to recreational areas. See 1954 Senate Hearing at 137. The fact that between the time of the Senate hearing and passage of the Statehood bill, an addition was made to the bill making specific reference to recreational areas indicates that Congress intended the bill to have broader sweep than contemplated by the Senators during the 1954 Hearing.

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[6] Compare H.R. Rep. No. 675, 83d Cong., 1st Sess. 16 (1953) ("Proposed amendment 4 therefore reflects the feeling of the committee that the State be allowed to select without other limitations so long as selected lands are adjacent to established communities or suitable prospectively for community centers and recreation areas.") (House report makes recreation areas an independent basis of selection).

Additional light is shed on the purpose of Section 6(a) by the 1950 Senate hearings. Prior to 1950, the Statehood bill granted Alaska four sections out of every township. This system of land grants was abandoned, however, for the reason, among others, that this would make administration of the forest lands in Southeast Alaska difficult, if not impossible. See An Act to Provide for the Admission of Alaska into the Union: Hearings on H.R. 332 Before the Senate Committee on Interim and Insular Affairs, 81st Cong., 1st Sess. 479-85 (1950) (hereinafter 1950 Hearings). It was to remedy that problem that Senator Clinton Anderson suggested a series of land grants based on acreage as opposed to sections. In response, Governor Gruening of Alaska stated that such a scheme would be useful, both for the purpose of allowing communities to physically expand and for

development of a tourist industry. See id. at 484-85. While the court does not find this exchange should carry too much weight in interpreting 6(a), it does show that the framers of that section were aware that land was needed for tourist and recreational purposes as well as townsite expansion.[7]

---

[7] Part of the exchange reads as follows:

> The Chairman. That raises the question of what to do with the forest preserves.
>
> If Alaska is to be admitted as a State, I would think we would have to make up our minds that the interest of the Forest Service, per se, would have to be subordinated, not the interest of the state; would you agree to that?
>
> Governor Gruening. I would agree with that, but I think the Forest Service has an important function that should not be destroyed.
>
> I have mentioned the suburban development. If those areas around towns and coastal areas, which are good for tourist development could be released and made available to the State, it would be very desirable. We have had the situation up

IV. The BLM Land Grant

Additionally, the government argues that the presence of the parallel 400,000 acre grant from BLM lands for community development purposes indicates that the purpose of the grant was restricted. The 6(a) grant of 400,000 acres from BLM lands is unusual because Section 6(b) granted the State 102,550,000 acres of BLM lands without restriction. This, in effect, has

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[7] continued

> there until very recently that it was impossible to develop a tourist industry in southeast Alaska because the prospective lodge builder would come and see the beautiful scenery and say, "This is the place to build a lodge. I propose to invest my capital," and then upon investigation he found he could not buy 5 acres of land. The most he could get would be a permit.
>
> Most people are disposed, after they have invested their capital, effort, and labor, to want to have title to protect the fruits of that effort.

1950 Hearings at 484-85.

created overlapping grants for the reason that any land selectable under 6(a) is also selectable under 6(b). Based on this, the government argues:

> The only possible reason Congress could have had in making two separate grants of the same land with the same selection period and tract size was in insure that the 400,000 acres in 6(a) were likely to be used for community development and expansion. The only way that intent can be realized is to interpret the purpose clause as a requirement of the grant.

Govt. S.J. Brief at 19. The court declines to accept this argument for several reasons.

As noted by the government, the court has an obligation, if possible, to construe the statute so that every section has purpose, and an interpretation that makes any statutory sections meaningless or surplusage should be avoided. In order to avoid rendering the 6(a) grant of BLM lands a surplusage, it must therefore be given a different or more restrictive

purpose than the general land grant in 6(b). Such a restriction will exist, however, whether the restriction is for community purposes only, or, as the State argues, for community and recreation purposes. It does not follow from the fact that the section 6(a) grant must be read as restrictive that the restriction must be limited solely to community purposes.

Second, given that the state can select community and recreation lands under 6(b) anyway, it is likely that the purpose of the BLM land grant clause was to ensure that land around communities would be available, rather than to restrict state selections, since any restriction would be meaningless in any event. Such an interpretation is supported by legislative history as well.[8]

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[8] In a 1955 hearing before the House Committee on Interior and Insular Affairs,

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[8] continued

the Committee was explaining the Statehood bill section by section:

> [Mr Taylor (committee staff member)]: Section 205 (a) grants to the State of Alaska from the national forests in the new State area not to exceed 400,000 acres of land. This will be taken from the vacant, unappropriated, and unreserved public lands in Alaska.
>
> Second, it provides for a total acreage not to exceed 400,000 acres of land. All of this land shall be adjacent to established communities or in areas that will be suitable for prospective communities and recreational areas in Alaska.
>
> Mr. Pillion. My [sic] I interrupt there?
>
> The Chairman. Mr. Pillion. Mr. Pillion. Why is the phrase necessary which says, "which shall be adjacent to established communities or suitable for prospective community centers and recreational areas"? Why is that phrase used when the State of Alaska has complete freedom to select whatever land it wants? Do you know why that phrase was put in there limiting the selection to areas that will be adjacent to established communities?
>
> Mr. Taylor. Mr. Pillion, I do not know the thinking of the drafters on that, but perhaps Mr. Bartlett was present when they worked that paragraph over.

In any event, of the two grants in 6(a), the National Forest grant is far more important than the BLM grant and has always taken precedence in the mind of Congress. See, e.g., 1950 Hearings, supra; 1954 Hearings, supra. It is therefore dangerous to rely on the BLM

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[8] continued

> Mr. Bartlett. Simply, Mr. Pillion, another effort on the part of the committee to allow the new State to make land selections in amount to benefit the new State.
>
> Now, it is my recollection that this precise language was inserted at some time before the final, if that is the correct word, determination was made of the total acreage grant which should go to the Territory covered otherwise in this bill, put particulary so as to point out to the Secretaries of Agriculture and Interior that the Congress desired the new State to be able to select lands around the various communities for community development, pinpointing it as it were.

Hawaii-Alaska Statehood: Hearings Before the House Committee on Interior and Insular Affairs on H.R. 2535 and H.R. 2536, 84th Cong., 1st Sess. 240 (1955).

grant too heavily in interpreting the National Forest land grant.

In conclusion, it is clear that both the language of the grant within Section 6(a) and its legislative history support the State's interpretation of 6(a), namely that it provides for grants for both community expansion and new communities as well as for recreational areas. Militating against this result is 6(a)'s purpose clause, which states that the land grants are for "the purposes of furthering the development of and expansion of communities." However, this clause, if interpreted liberally, can be seen as referring to both the economic as well as physical growth of communities. Such an interpretation is preferable for the reasons that it effectuates Congressional intent and avoids a conflict between the purpose clause and grant

clause in Section 6(a). The court therefore finds that the Forest Service's interpretation is unreasonable and contrary to law.[9]

V. Suitable vs. Reasonable Expectancy

The State also challenges the government's interpretation of the word "suitable" in the phrase "suitable for prospective community centers and recreational areas." The government has interpreted this word to require, in addition to physical suitability, that "there must be reasonable expectancy that the site will be developed for those purposes." F.S.M. § 5454.22(4)(a)(1). (Emphasis added). See also Id. § 5454.22(4)(a)(2) (applying

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[9] The court agrees with the government that this court must give deference to the Secretary's interpretation of the Statehood Act. See Andrus v. Idaho, 445 U.S 715, 729 (1980); United States v. Wyoming, 331 U.S. 440, 446, 454 (1947). Nevertheless, where, as here, the Secretary's interpretation is unreasonable, the court must set it aside.

"reasonable expectancy" requirement to definition of word "adjacent").

This "reasonable expectancy" requirement is contrary to law. In applying this test to the State's land selections, the Forest Service is exceeding its authority under 6(a). See Payne v. Central Pacific Ry. Co., 255 U.S. 228, 236 (1921). The plain language of the statute only created two limitations on the State's land selections. Land surrounding present communities must be "adjacent" to it. Land selected for prospective community centers and for recreation areas must be suitable for that purpose. Any additional requirements are contrary to the plain language of the statute.

The federal government argues that, since almost all National Forest lands are physically suitable for recreation, a less restrictive interpretation of the statute

"would disrupt the careful balance established by Congress between the need for community development and expansion and the need to protect the National Forest system in this State. The State would replace that balance with a carte blanche allowing it to select anywhere in the National Forest." Fed. S.J. Brief at 14.

The National Forest will be protected by the primary limit in the grant, i.e., the size limit of 400,000 acres. As far as the State having a carte blanche in otherwise selecting lands for community and recreational purposes, the court finds this is precisely what Congress intended. Other than the limit of 400,000 acres, no other "delicate balance" was ever intended by Congress. There simply is no history or authority for the proposition that Congress intended the State to select only in certain areas of the Forest.

The federal government also argues that the State's interpretation will give the State "the ability to select any vacant and unappropriated land anywhere in the National Forest for any purpose." Fed. Reply Brief at 3. In raising this argument, the government asserts that the State will make pretextual land selections, i.e., select land as being suitable for recreational areas when in fact it wanted the land for other purposes, such as logging. The issue of pretextual selection is not before the court. The State's land selection process to date has been run publicly and honestly. There is absolutely no indication in the record that the State is attempting to select land for other than community or recreational purposes. In the absence of pretextual selections, the court finds no reason that the State should not be able to select land anywhere in the National

Forest for community and recreational purposes, so long as it is physically suitable for those purposes.

Accordingly, IT IS ORDERED:

(1) THAT the State's motion for summary judgment is granted;

(2) THAT the federal government's motion for summary judgment is denied;

(3) THAT the portion of the final administrative determination of the Department of Agriculture disapproving Section 6(a) State land selections is reversed;

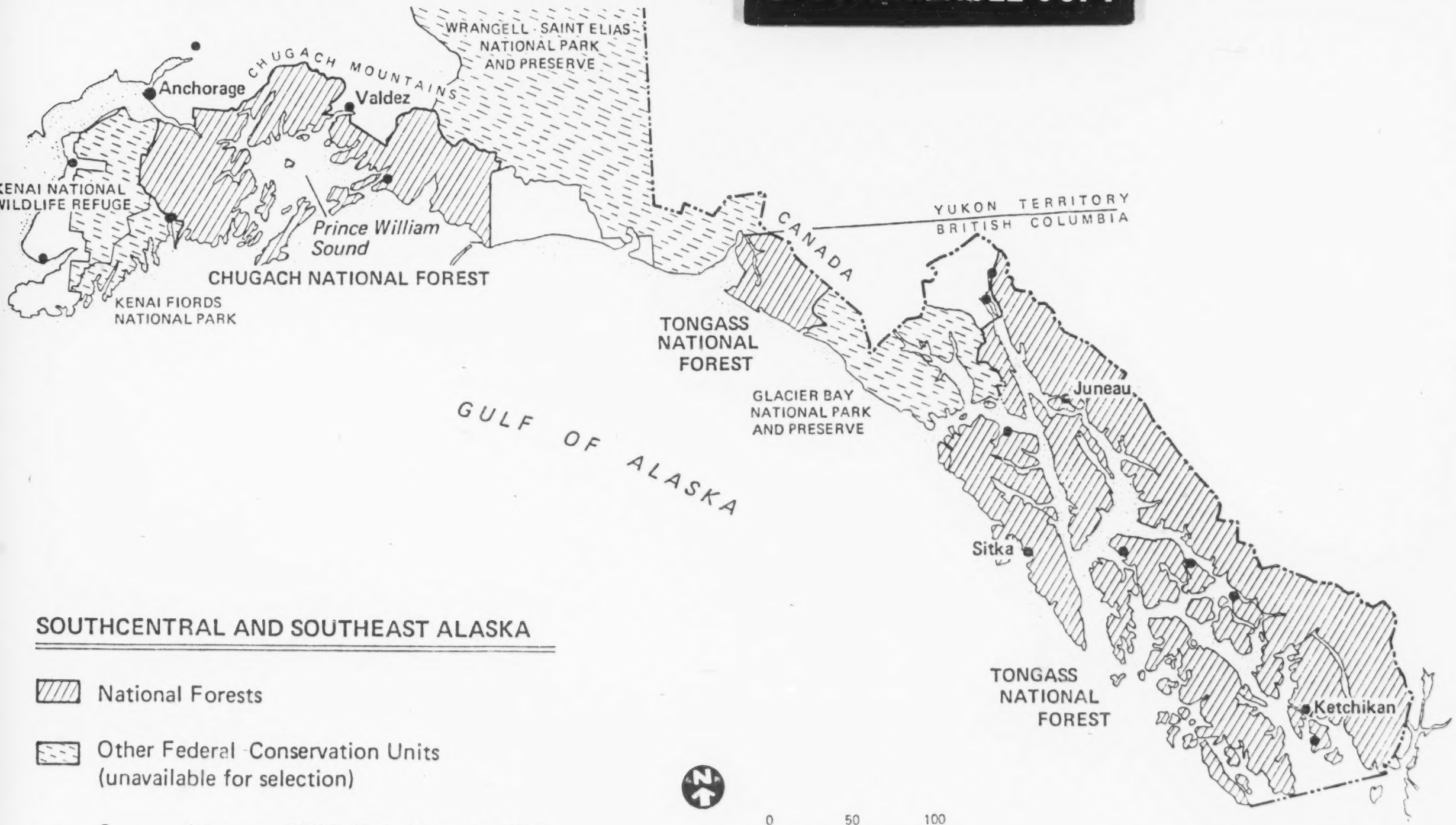
(4) THAT this matter is remanded to the Secretary of Agriculture to reconsider the disapproved selections in light of the above opinion;

(5) THAT the clerk shall prepare a final judgment incorporating items (2), (3) and (4) above.

DATED at Anchorage, Alaska, this 22nd day of April, 1985.

s/
United States District Judge

cc: Michele D. Brown
U.S. Attorney



SOUTHCENTRAL AND SOUTHEAST ALASKA

- National Forests
- Other Federal Conservation Units (unavailable for selection)
- • Communities over 500 in Population in 1980

APPENDIX D

Section 4 of The Forest Service Manual 5454.22 (6/77 amendment, formerly E.O. No. 16 effective February, 1976) provided:

> A. The application by the State must be accompanied by a plan, with appropriate maps, which in the judgment of the Regional Forester adequately shows the applied for lands meet the following criteria for selection.
>
> (1) Lands reasonably needed and suited now for the following purposes and which are situated at locations set forth in item (2).
>
> (a) Homesites.
>
> (b) Industrial sites, including facilities for serving transient air, water, and auto travel, including access.
>
> (c) Urban recreation sites to serve local residents as contrasted to those serving traveling visitors with facilities.
>
> (d) Sites for municipal facilities, such as schools, playgrounds, and public buildings, including domestic and industrial water facilities.
>
> (e) Access to deep water harbors, airports, and other customarily provided municipal facilities.
>
> (f) Related abutting lands needed to extend to logical

definable boundaries which will serve as urban open space and particularly when use must be correlated with purposes stated in items (a) through (e).

(2) Lands situated at the following locations for the purposes set forth in item (1), and which will be expected to mature into a permanent or seasonal settlement of homeowners.

(a) Adjacent to existing townsite exclusions and eliminations.

(b) Areas needed for new townsites to permit development of natural resources which cannot be reasonably served by established townsites or expansion thereof or by existing State selected areas not yet developed.

(c) Natural harbors reasonably suited and developed for servicing transient traffic and with a settlement having a population of five families during the period 1960-1969 (or a population of 25 or more recorded in the 1960 census); and suitable sites that will be needed for ferry and bridge facilities, terminals and related use.

(d) Other natural harbors not now having settlements but which are capable of being developed for, and whose development is needed for, servicing transient traffic, and which natural harbors are located not closer than 40 miles from an existing community.

(3) All land proposed for selection under item (2) above must now or prospectively have value for the uses described in item (1) above and must be described in a generalized plan including a map showing what uses will be made of the selected lands.

APPENDIX E

Forest Service Manual 5454.22 -- Alaska Community Development

4. Procedures. Each selection will be initiated through an application by the State to the Regional Forester.

a. The application by the State must be accompanied by descriptions and maps, which, in the judgment of the Regional Forester, provide sufficient detail to permit the responsible judgment to be made on whether the tract may be selected under the Alaska Statehood Act.

It is the responsibility of the State to provide sufficient documentation and analysis to support the conclusion that there is a reasonable expectancy that the sites will be used for the specified statutory purposes and that the site is either adjacent to an existing community or suitable for the development

of the community center and recreation area.

In order to be selected under the act, the selected tract must be either suitable for prospective community centers and recreation areas or must be adjacent to an established community.

(1) Suitable. In order to qualify as suitable for a prospective community center and recreation area, a site must be physically able to support development of a community center and recreation area. In addition, there must be a reasonable expectancy that the site will be developed for those purposes. The phrase "prospective community center and recreation area" is to be read as a single standard and not as two separate or independent bases for land selections.

(2) Adjacent. In order to qualify as adjacent to an existing community, a site must be near to but need

not be adjoining an established community. In addition, there must be a reasonable expectancy that the land will, in fact, be used for furthering community development. For the purposes of this evaluation, a borough does not constitute a community.

b. Upon a determination by the Regional Forester that the application meets the criteria set forth in item (a), the application and supporting documents shall be forwarded to the Regional Attorney, Office of the General Counsel, Portland, Oregon, for a determination that approval can be granted without conflict with the terms of the Alaska Statehood Act.

No. 86-1071

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF ALASKA, PETITIONER

v.

RICHARD E. LYNG, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary of Agriculture reasonably interpreted Section 6(a) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 340, 48 U.S.C. Ch. 2 note at 578, under which the State may select, "with the approval of the Secretary * * *," up to 400,000 acres of lands from national forests in Alaska "[f]or the purposes of furthering the development of and expansion of communities," to require that the State's selections be lands that have a nexus to established or prospective communities.

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In the Supreme Court of the United States

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A24) is reported at 797 F.2d 1479. The opinion of the district court (Pet. App. B1-B31) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1986. On October 29, 1986, Justice O'Connor extended the time within which to file a petition for writ of certiorari to and including December 23, 1986. The petition was filed on December 22, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 6(a) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 340, 48 U.S.C. Ch. 2 note at 578, provides that "[f]or the purposes of furthering the development of and expansion of communities," the State may select, "with the approval of the Secretary of Agriculture,"

up to 400,000 acres from national forest lands. It further provides that all selections "shall be adjacent to established communities or suitable for prospective community centers and recreational areas." *Ibid.*[1]

In accord with the statutory language, the Forest Service for many years has consistently interpreted Section 6(a) to require a "community nexus." Before the Forest Service will approve a selection by the State, it must be shown that the selected land is either adjacent to an established community or suitable for prospective community centers and recreational areas, and that there is a reasonable expectation that the selected land will be used for community development and expansion.

The State voiced no objection to the Forest Service's interpretation for almost twenty years, until late 1976, when the State adopted a new interpretation of Section 6(a).[2] In an opinion letter issued in 1977, the Attorney General of Alaska concluded that the State could select lands under Section 6(a) without showing any community nexus or expectation of actual use for the selected purpose (C.R. 18, at 25).

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[1] Section 6(a) also permits the State, for the same purposes and subject to the same conditions, to select up to 400,000 acres "from the other public lands of the United States in Alaska • • •," with the approval of the Secretary of the Interior. By contrast, Section 6(b), which confers upon the State a general authority to select up to 102,550,000 acres of unreserved public lands, contains no similar adjacency or suitability limitations and lacks a purpose clause. Other subsections of Section 6 automatically vest title to specified lands or improvements, without prior selection by the State or approval by the federal government. See Section 6(c)-(f), (i)-(k), and (m).

[2] The State had made its first selections in the early 1960's; by 1969, the Forest Service had approved selections aggregating more than 20,000 acres. E.R. 35-36. "E.R." refers to appellants' excerpts of the record filed in the court of appeals. "C.R." refers to the clerk's record in the district court.

2. On December 19, 1977, the State of Alaska filed applications under Section 6(a) for 247,597 acres in the Chugach and Tongass National Forests (Pet. App. A3). The Regional Forester approved approximately 200,000 acres of the selections and disapproved 51,050 acres of those selections (*id.* at A4).[3] The disapproved selections were among several selections proposed by the State for "marine recreation" sites or for fish hatchery sites.

The Forest Service did not disapprove all of the State's selections for marine recreation and fish hatchery sites; indeed, such selections were approved where there was sufficient information to indicate that the statutory criteria had been met. But the Forest Service initially deferred decision on several selections where the State provided insufficient information and the Service was without independent information to support a finding that a selection satisfied the Act.

After the State declined to provide sufficient information to support those selections, the Forest Service disapproved recreational land selections that were more than 25 nautical miles from an existing community, unless independent evidence indicated the selection was suitable for community-based (as opposed to regional, state or nationwide) recreation use.[4] Proposed fish hatchery sites that were isolated from existing or prospective community

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[3] We have been advised that since enactment of the Statehood Act, the Forest Service has approved approximately 268,000 acres of national forest lands selected by the State under Section 6(a).

[4] When information indicating a nexus between a selection and an established or prospective community was not forthcoming from the State and was not otherwise available, the Forest Service utilized a rule of thumb under which selected lands are considered to be "community-linked" if they are within 25 nautical miles of a community. Contrary to its description by petitioner, the 25-mile guideline is not a fixed rule, but can be overcome by other information to indicate that a particular recreation area selection is community-linked (see E.R. 39-41).

centers were similarly disapproved, while those reasonably accessible to existing communities or prospective community centers were approved.[5]

3. The State brought this suit challenging the administrative decision. The district court granted the State's motion for summary judgment, holding that the Forest Service had erred in its interpretation of the statute. The court ruled (Pet. App. B27-B29) that Section 6(a) allows the State to select vacant and unappropriated land anywhere in Alaska national forests for community or general recreational purposes, as long as the land is physically suitable for either purpose. The court also agreed with the State (Pet. App. B29) that since almost all national forest lands are physically suitable for recreation, Congress must have intended the State to have "*carte blanche*" to select any such lands for a recreational purpose. The court thus concluded (*id.* at B30-B31) that the only substantive restriction upon the State's ability to obtain title to vacant and unappropriated national forest lands under Section 6(a) is the statutory 400,000-acre cap.

4. The court of appeals reversed. It held (Pet. App. A16-A21) that the Secretary's interpretation of Section 6(a) is reasonable and remanded the case to the district court to determine whether the Secretary's application of Section 6(a) to the disapproved selections was arbitrary and capricious. The court of appeals noted that this Court "has held that the 'approval of the Secretary' power conferred under land grant statutes gives the Secretary the authority and the duty 'to determine the lawfulness of the selections' " (Pet. App. A8 (citation omitted)). And the

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[5] The State appealed the Regional Forester's disapprovals to the Chief of the Forest Service, who affirmed the decisions of the Regional Forester (Pet. App. A4). The Secretary of Agriculture declined review of the decision, rendering the Chief's decision the final administrative determination of the Department of Agriculture (*ibid.*).

court rejected the State's contention that Section 6(a) provides an unconditional grant of 400,000 acres, since the statutory language and legislative history show that the Forest Service's interpretation of Section 6(a) is faithful to congressional intent.

Judge Schroeder, writing separately, concurred in the court's decision that the Statehood Act requires a community nexus and dissented from the portion of the decision upholding the Forest Service requirement that the selection generally be within 25 miles of existing or already planned communities (Pet. App. A22).

ARGUMENT

The interlocutory judgment of the court of appeals in this case is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioner contends (Pet. 9) that the Forest Service has misconstrued the Alaska Statehood Act.[6] But the interpretation upheld by the court of appeals is the interpretation that has been followed since enactment of the statute by the agency charged with administering the provision at issue. Under well-settled principles of statutory construction, a reasonable interpretation of a statute by the agency to which Congress has entrusted the statute's administration is entitled to deference. *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 9-10, 17; *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845

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[6] Petitioner asserts (Pet. 7 n.11) that it does not seek review of the court of appeals' decision that prospective recreational sites must have a community nexus, and apparently now agrees that the word "community" modifies both "centers" and "recreational areas" in the statutory phrase "suitable for prospective community centers and recreational areas" (see Pet. 8).

(1984); *Alcoa* v. *Central Lincoln Peoples' Utility Dist.*, 467 U.S. 380, 389-390 (1984); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

Petitioner isolates (Pet. 10) the terms "suitable" and "prospective" in the statutory phrase "suitable for prospective community centers and recreational areas," and suggests that the only reasonable definitions for these terms are those petitioner has selected from a dictionary.[7] In this way, petitioner asserts (Pet. 8) "the statute's only requirement is physical suitability for future use." The court of appeals, however, looked to the context in which the words were used, including the statement of purpose in Section 6(a), and concluded that (Pet. App. A20):

> Because the stated purpose of the grant is to further community development and expansion, it is not unreasonable to require the state to show some expectancy that the land will be used for those purposes. One factor going into a determination of suitability * * * is the likelihood that people will move there.

The Secretary's interpretation properly advances Congress's stated purpose and gives meaning to the word "prospective" by limiting approval to those selections offering a reasonable prospect of actual use for the statutory purposes.

The Secretary's interpretation also takes into account—as petitioner's interpretation does not—the fact that Section 6(a) is only one of several provisions granting

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[7] The dictionary upon which petitioner relies also provides definitions consistent with the Secretary's interpretation that, in order to be *suitable* for *prospective* community centers and recreational areas, there must be a reasonable prospect that the land will actually be so used. See *Webster's Third New International Dictionary* 2286 (unabridged ed. 1966) (suitable: "having the necessary qualifications: meeting requirements"); *id.* at 1821 (prospective: "in prospect" or "effective in the future").

federal land to the State. While Section 6(a) in terms enables the State to select land for the specific purposes of community development and expansion, Section 6(b), which is directed to the more general needs of the State, bestows on the State an additional grant of more than 102 million acres of public lands (see note 1, *supra*).[8]

Finally, the Secretary's interpretation is supported by the legislative history. For example, the "Principal Land Provisions" section of the 1954 Senate Report to accompany S.50, 83d Cong., 1st Sess. (1953), described the national forest land grant as "[l]ands adjacent to the various Alaska communities, including lands in the national forests, *which will be needed* for the expansion of those communities or the creation of new ones." S. Rep. 1028, 83d Cong., 2d Sess. 4 (1954) (emphasis added).

At the Senate hearing on the proposed bill, that provision was discussed by the territorial governor of Alaska who had participated in its drafting. See *Alaska Statehood, Hearings on S.50 Before the Senate Comm. on Interior and Insular Affairs*, 83d Cong., 2d Sess. 137-140 (1954) (*Hearings*). As that discussion makes clear, community development was identified both as the underlying purpose of the national forest land grant and as a substantive requirement for selections (*id.* at 138-140):

> Senator Anderson: So that as to this particular section, it would be your judgment that it is desirable to make grants for the expansion of communities?

---

[8] It was Section 6(b) that accomplished the stated congressional goal of "alter[ing] the distorted landownership pattern" in Alaska through the land grants (H.R. Rep. 624, 85th Cong., 1st Sess. 6 (1957)), a purpose that petitioner incorrectly attributes to Section 6(a) (Pet. 2-3). See 104 Cong. Rec. 12011-12012 (1958) (statement by Senator Jackson distinguishing between the "express purpose" of Section 6(a) and Section 6(b)'s broad "purpose of getting the land out of Federal ownership and onto the tax rolls to help expand the existing base for self-government.").

Governor Heintzleman: That is right; 200,000, I think, would be enough, but I don't have objection to 400,000.

Senator Anderson: I think 200,000 would be enough, too, but some people said we failed to visualize the opportunities of future growth. * * *

* * * * *

Governor Heintzleman: I think the language as here now is sufficient. It says, "The Secretary of Agriculture shall agree." It has to be an agreement between the Secretary of Agriculture and the State. And I don't look for any trouble on that score at all.

Senator Anderson: You have to show some cause for it.

Governor Heintzleman: That is right.

Senator Clements: If they needed 200,000, they would get 200,000, and if they ever wanted 400,000, they could get it.

* * * * *

Senator Anderson: * * * Now, the means test was somewhat unpopular in WPA days, but we did intend that a means test should be applied to this, that they actually needed the relief before they got it. And if the language can be rephrased so that it is clear that this is to be granted to them only as they expand into these areas and need it, that is exactly what I intended to do.[9]

---

[9] Earlier in those same hearings, there had been some confusion that only the public lands, and not the national forest lands, need be "adjacent to established communities or suitable for prospective community centers and recreational areas." Senator Anderson, however, confirmed that "[t]hey are both limited to that." *Hearings* 6. Senator

These congressional objectives were carried forward in Section 6(a) as enacted.[10]

2. Petitioner also challenges the Forest Service's 25 nautical mile rule of thumb for recreational selections, and the disapproval of several fish hatcheries. As noted above, the Forest Service applied that rule of thumb only after the State declined to provide to the Forest Service sufficient information supporting its selections. Even then the 25-mile standard, which is based on factors indicating that 25 nautical miles is a distance reasonable for non-overnight recreation, was merely one guide for determining whether a particular recreational site was sufficiently tied to a community to meet the statutory requirements. That "rule" was not dispositive when other information indicated a community nexus (E.R. 41). The selections at issue in this case were disapproved when, upon petitioner's failure to provide additional information showing a reasonable tie between the selection and existing

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Jackson suggested expanding the grant clause beyond community expansion and development, but no changes were made in response to his comments (*id.* at 6-7).

[10] Congress has twice amended restrictions in the Statehood Act which concerned the State's selections under Section 6(a). In 1963, Congrees amended Section 6(g), reducing the minimum acreage required for a Section 6(a) selection from 5,760 acres to 160 acres. In the Department of Agriculture's legislative report to Congress on the amendment, the Secretary explained his interpretation of Section 6(a) and recommended, based on that interpretation, that the amendment be adopted. S. Rep. 468, 88th Cong., 1st Sess. 2-3 (1963). Congress did not take issue with this interpretation of Section 6(a) when it amended Section 6(g), and the legislative history of the amendment indicates that Congress agreed with the Forest Service's interpretation. *Id.* at 1-2. This Court has stated that legislative approval of the established administrative interpretation in the course of amending the statute is "virtually conclusive." *CFTC* v. *Schor*, No. 85-621 (July 7, 1986), slip op. 12. In 1980, Congress extended the 25-year period for Section 6(a) selections to 35 years. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, § 906(a), 94 Stat. 2437.

or prospective communities, and upon review of other available information, there was an insufficient basis for concluding that certain selected sites had the required community link. This, of course, does not preclude the possibility that some of the same lands could be the subject of a future selection by the state and, upon a proper showing, could be approved.

3. There is no merit to petitioner's contention (Pet. 17) that there is a "long history of deference to statehood compacts" which "limit the Forest Service's role to a procedural function of verifying that Alaska's selections met the statutory criteria." Section 6(a) includes no such limitation; it provides that "lands shall be selected * * * *with the approval of the Secretary of Agriculture* as to national forest lands" (emphasis added). This Court has repeatedly found that a requirement of "approval" by the Secretary is a congressional charge to determine whether the selections are in compliance with the grant. *E.g., Payne* v. *New Mexico,* 255 U.S. 367, 371 (1921). Accord, *Wyoming* v. *United States,* 255 U.S. 489, 503-504 (1921); *Wisconsin Cent. R.R.* v. *Price County,* 133 U.S. 496, 512 (1890). The Secretary thus has the duty, "judicial in nature" (255 U.S. at 371 (citations omitted)), to determine the lawfulness of the selections.[11]

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[11] Contrary to petitioner's assertion (Pet. 17), *Andrus* v. *Utah,* 446 U.S. 500 (1980), does not support the proposition that the Secretary lacks authority to restrict Alaska's selections absent subsequent enabling legislation. Under the Utah Enabling Act of 1894, ch. 138, 28 Stat. 107 *et seq.*, Congress granted Utah, upon admission, four numbered sections in each township, identified specifically in the Act, for the support of public schools. 28 Stat. 109. There was no requirement that the public school lands be approved by the Secretary. The Act also permitted Utah to substitute "indemnity lands" if the designated sections had already been disposed of pursuant to another act of Congress, such "indemnity lands" to be selected as the state legislature provided, "with the approval of the Secretary of the Interior." *Ibid.* No conditions were placed on the State's selection of indemnity lands other than that such selections be of unappropriated,

In determining the lawfulness of selections, the Secretary has reasonably concluded that Congress intended that the Forest Service approve selections when information indicates a reasonable likelihood of community use for national forest lands.[12] Under the Administrative Procedure Act, 5 U.S.C. 706, petitioner cannot prevail unless it shows that the Secretary acted outside of his statutory authority, or that the disapprovals of the State's selections were "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." See, *e.g.*, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 413-414 (1971). The latter issue will be the subject of the proceedings to be held in the district court upon the

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nonmineral lands. In *Andrus* v. *Utah*, this Court explained that prior to subsequent legislation it was "clear * * * that the State's title to unappropriated land in designated sections could not be defeated after survey, and that their right to indemnity selections could not be rejected if they satisfied the statutory criteria when made, and if the selections were filed before the lands were appropriated for other purposes." 446 U.S. at 511. At issue in that case was whether subsequent legislation modified the Secretary's approval authority in the Utah Enabling Act to authorize the Secretary to disapprove selections which met the enabling Act's original requirements. The Court concluded that later legislation did have that effect. *Id.* at 520. There is no comparable issue in this case, nor is the grant or purpose language in Section 6(a) similarly limited in scope so as to reduce the Secretary to a purely ministerial role.

[12] Deference to the agency's interpretation is particularly appropriate in cases involving a land grant. It is well established that "land grants are construed favorably to the government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *United States* v. *Union Pacific R.R. Co.*, 353 U.S. 112, 116 (1957); accord *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 617 (1978) (when grants of federal lands are at issue, any doubts "are resolved for the Government"). See also *United States* v. *Sweet*, 245 U.S. 563 (1918); *Humboldt County* v. *United States*, 684 F.2d 1276 (9th Cir. 1982).

remand ordered by the court of appeals. In its present interlocutory posture, the case does not warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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No. 86-1071

IN THE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF ALASKA,
Petitioner,

v.

RICHARD E. LYNG, Secretary of Agriculture,
R. MAX PETERSON, Chief,
United States Forest Service, and
MICHAEL A. BARTON, Alaska Regional Forester,
and Their Respective Successors in Office,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF

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1. Respondents assert that the Forest Service's interpretation of Section 6(a) is entitled to deference by this Court, because it is a longstanding and reasonable interpretation by the agency charged with the section's

implementation and was not challenged by Alaska for twenty years. (Resp. 2, 5). This argument is simply wrong.

At the outset, the Forest Service's interpretation is not as longstanding as Respondents contend. For instance, the 25 nautical mile "rule of thumb" for recreational selections is not an "interpretation that has been followed since enactment of the statute [1959] by the agency charged with administering the provision at issue." (Resp. 5, 9). This "rule of thumb" was never expressed orally or in writing until 1978 when the Forest Service disapproved the selections at issue. Indeed, this "rule of thumb" has never been formally included in the four sets of guidelines issued by the Forest Service since 1959 concerning Alaska's Section 6(a) selections.

Although the Respondents assert that the "State voiced no objection to the Forest Service's interpretation for almost twenty years, until late 1976," the fact is that the Forest Service's interpretation was not at issue until 1976 when Alaska undertook its first major land selection program under the Section 6(a) grant. (Resp. 2). Prior to that date, Alaska's Section 6(a) land selections were for small acreages to implement specific projects. It was not until 1976 that Alaska achieved sufficient planning expertise to undertake the painstaking analysis necessary to choose the only lands it would ever receive in its southern regions. Furthermore, as discussed above, some of the critical factors the Forest Service used to judge Alaska's selections were not even made

public prior to 1978, so no objection could have been raised. 1/

2. Respondents seek to find refuge in the plain meaning of the Act. But the alternative dictionary definitions proffered by the Respondents support Alaska's interpretation, for they confirm that the Act's only requirement is physical suitability for future use. 2/ Moreover, the

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1/ Likewise, Congress' two amendments of the Statehood Act did not ratify the Forest Service's position. (Resp. 9 n.10). Congress never addressed the Secretary of Agriculture's position on the types of land selections allowed under the Section 6(a) grant. The State of Alaska actively sought both amendments to the Statehood Act in order to better plan for and use its limited land grants. Therefore, the issues presented here were never considered during Congressional action on either amendment.

2/ Respondents attempt to draw significance from the fact that the term prospective is also defined to mean "in

Respondents incorrectly assert that Alaska's interpretation "does not [take into account] the fact that Section 6(a) is only one of several provisions granting federal land to the State." (Resp. 6-7). Alaska's interpretation recognizes, as it must, that the Section 6(a) land grant is limited to lands "suitable for prospective community and recreational areas." Alaska contends that the statute only requires a showing of physical suit-

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prospect" or "effective in the future." (Resp. 6. n.7) But this is simply to say that the term means pertaining to the future, and that is precisely how Alaska contends the statute should be construed. Similarly, the alternative definitions proffered for the term "suitable" ("having the necessary qualifications; meeting requirements") support Alaska's position that it need only demonstrate physical suitability for future use as a community or recreational area.

ability for those purposes, and not, as the Forest Service contends, a showing of "need" for the land or a formal "plan" to use the land for a particular purpose which satisfies a Regional Forester.

The purpose of the Section 6(a) land grant would, in fact, be frustrated by the "reasonable expectancy" requirement because, as the district court noted, there "is absolutely no indication in the record that the State is attempting to select land for other than community or recreational purposes." (Pet. App. B-30). Therefore, Alaska's satisfaction of the Section 6(a) requirements should not be judged under a Regional Forester's view of which lands will further Alaska's community development because, as the district court found,:

The land grant provisions in

> the Statehood Act serve a remedial purpose and therefore must not be construed strictly to defeat their purpose. See, e.g., Leo Sheep Co. v. United States, 440 U.S. 668, 682-83 (1979); Wyoming v. United States, 255 U.S. 489, 508 (1921); United States v. Denver and Rio Grande Ry. Co., 150 U.S. 1, 15 (1893). A strict interpretation of the Act and purpose clause, as proposed by the government, would act to defeat the land grant's purposes of creating an economic self-sufficient state, furthering economic expansion, and relieving the State from the federal government's stranglehold on Alaskan land.

(Pet. App. B-11 - B-12).

3. Moreover, there is no suggestion in the legislative history from the 85th Congress, which enacted the Alaska Statehood Act, that Alaska's right to conveyance of its full entitlement of 400,000 acres of national forest land is contingent upon establishing, to the satisfaction of the Forest Service, that the

land selected is needed for planned community development, as distinct from suitable for prospective use. Respondents support their position that the Section 6(a) grant is subject to the Forest Service's assessment of need by citing the Hearings On S.50 Before The Senate Committee On Interior And Insular Affairs, 83rd Cong., 2d Sess. 137-140 (1954). That testimony referred to a different bill (S.50, the 1953 proposed statehood bill, which Congress explicitly rejected in 1958 in favor of H.R. 7999), and occurred before a different Congress (83rd rather than 85th) four years prior to enactment of the Alaska Statehood Act. 3/

3/ The statements quoted were made by Governor Heintzleman, the Regional Forester in Alaska from 1937 until his

Furthermore, the Respondents quote from Senate Report No. 1028 (accompanying S.50 in the 83rd Congress) to describe the national forest grant as those lands "which will be needed for the expansion of those communities or the creation of new ones." (Resp. 7). In fact, that language was specifically deleted from the subsequent House Report which accompanied the version of the Statehood Act ultimately adopted, even though the House

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temporary appointment as Territorial Governor in 1953, and by Senator Anderson, formerly Secretary of Agriculture. Senator Anderson described Governor Heintzleman earlier in the proceedings as "not ... too enthusiastic about statehood." Hearings on S.50 before the Senate Committee on Interior and Insular Affairs, 83rd Cong., 2nd Sess. 8 (1954).

Report otherwise borrows liberally from the earlier Senate Report. House Report 624, 85th Cong., 1st Sess. (1957) reprinted in 1958 U.S. Code Cong. & Ad. News 2933.

In the 1958 legislative history, it is clear that Congress intended to reverse the pattern that had been established for Alaska as a territory, which allowed Alaska to develop solely "on the sufferance of ... Federal agencies." H.R. Rep. 624, reprinted in 1958 U.S. Code Cong. & Ad. News 2937-39. Instead, Alaska, as a state, was granted land under Section 6(a) to develop community and recreational areas. Therefore, it is particularly inappropriate to authorize a Regional Forester to impose his view of which lands accomplish the Section 6(a) purpose when the district court found

that Alaska's selections, in fact, fulfilled the grant's purpose. (Pet. App. B-10, B-30).

4. Finally, respondents repeatedly characterize the Ninth Circuit's decision as interlocutory in nature. The statutory interpretation issue presented is clearly ripe for review by this Court. The Ninth Circuit's decision has established the statutory interpretation of the Statehood Act which will be applied by the district court on remand for these specific disapproved sites and has set the standard for the remaining 550,000 acres to be selected. Therefore, it is entirely appropriate and necessary for this Court to address the questions of statutory interpretation raised by the Ninth Circuit's erroneous interpretation of the Alaska Statehood Act, particularly

because the dispute is between two sovereign entities. See United States v. General Motors Corp., 323 U.S. 373, 377 (1945).

CONCLUSION

For the foregoing reasons and the reasons stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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